STATE OF MICHIGAN

COURT OF APPEALS

LINDA ANN COMPTON,

Plaintiff-Appellant,

v

MIRAC, INC., and HUNTER-PRELL COMPANY,

Defendants-Appellees,

and

DEMAAGD LAND COMPANY and ASSOCIATED CONSTRUCTION,

Defendants.

UNPUBLISHED
September 23, 2014

No. 316662
Calhoun Circuit Court
LC No. 2012-001572-NO

LINDA ANN COMPTON,

Plaintiff-Appellant,

v

ENTERPRISE LEASING COMPANY OF DETROIT, d/b/a ENTERPRISE RENT-A-CAR,

Defendant-Appellee,

and

MATTHEW P. DEMAAGD, Successor Trustee of JAMES C. DEMAAGD REVOCABLE TRUST,

Defendant.

No. 316671
Calhoun Circuit Court
LC No. 2011-001467-NO

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

In these consolidated cases, plaintiff appeals as of right the trial court's order granting summary disposition to defendant's Mirac, Inc., Hunter-Prell Company, and Enterprise Leasing Company of Detroit, d/b/a Enterprise-Rent-A-Car. For the reasons set forth in this opinion, we affirm.

These cases arose from an incident in which plaintiff was injured while approaching Enterprise's office. Plaintiff arranged to rent a vehicle from Enterprise while her own was being repaired. An Enterprise employee picked plaintiff up from a collision shop and drove her to the Enterprise premises in question. Plaintiff stated that when she arrived at Enterprise she observed ongoing construction and a trench near the Enterprise building. The Enterprise employee told plaintiff that she needed to come into the office to complete some paperwork. The Enterprise employee walked through the trench to get to the Enterprise building. Plaintiff, without any instruction to do so, followed the Enterprise employee through the trench. Plaintiff fell as she stepped into the trench, and sustained injuries.

Plaintiff filed two separate cases related to the incident. In a stipulated order entered on August 31, 2012, the trial court consolidated the cases. In the first, *Compton v Enterprise Leasing Co and DeMaagd*, Calhoun Circuit Court Docket No. 2011-001467-NO, plaintiff named as defendants, Enterprise Leasing Company of Detroit, d/b/a Enterprise Rent-A-Car, and Matthew P. DeMaagd, Successor Trustee of the James C. DeMaagd Revocable Trust.[1] The first amended complaint alleged that the DeMaagd Trust owned the real property on which the Enterprise building was located, and that the DeMaagd Land Company leased the premises to Mirac, Inc. Plaintiff alleged that defendants were negligent in that they failed to maintain the property in a safe condition by allowing an open and unmarked trench to exist on the property, failed to take steps to make the property safe for business invitees, and failed to remedy the dangerous condition.

In the second case, *Compton v Mirac, Inc*, Calhoun Circuit Court Docket No. 12-001572-NO, plaintiff named as defendants Mirac, Inc., DeMaagd Land Company, Associated Construction, and Hunter-Prell Company. Plaintiff alleged that all defendants owned or were in possession of or controlled the property on which her injury occurred, and that all defendants failed to maintain the property in a safe condition, failed to inspect the area and remove hazards, and failed to warn her of the dangers.

Hunter-Prell moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's claim sounded in premises liability, that the danger posed by the trench was open and obvious, and that no special aspects existed to make the hazard unavoidable because plaintiff could have used an alternate route to enter the Enterprise building.

[1] The first amended complaint referred to entities DeMaagd Land Company, Mirac, Inc., the Sherwin-Williams Company, Associated Construction, and Hunter-Prell Company as defendants; however, those entities were not included as defendants in the caption.

Mirac/Enterprise moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that they were not in possession or control of the premises on which the injuries occurred. They also argued that even if they could be deemed to be in possession or control of the premises, they could not be liable for plaintiff's injuries because the hazard was open and obvious and no special aspects made the condition unreasonably dangerous.

The trial court found that Mirac/Enterprise were entitled to summary disposition under MCR 2.116(C)(10). The trial court held that plaintiff's claim sounded in premises liability, and that Mirac/Enterprise could not be liable under such a claim because neither possessed or controlled the property. In addition, the trial court found that the dangerous condition was open and obvious.

The trial court granted summary disposition to Hunter-Prell under MCR 2.116(C)(10), holding that the trench was open and obvious and that no special aspects existed because alternative routes existed and plaintiff could have entered the building via one of those routes.

On appeal, plaintiff argues that her claim against Enterprise sounded in ordinary negligence, not premises liability; therefore, the open and obvious doctrine did not apply.

We review de novo the trial court's decision on a motion for summary disposition. In reviewing the decision on a motion brought pursuant to MCR 2.116(C)(10), we must review the record evidence and all reasonable inferences drawn therefrom in a light most favorable to the nonmoving party, and decide whether a genuine issue of material fact exists. *Trepanier v Nat'l Amusements, Inc*, 250 Mich App 578, 582-583; 649 NW2d 754 (2002).

We review de novo a question of law. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

A possessor of land has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A possessor of land may be held liable for injuries resulting from negligent maintenance of the land. The duty to protect an invitee does not extend to a condition from which an unreasonable risk of harm cannot be anticipated, or from a condition that is so open and obvious that an invitee could be expected to discover it for himself. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995).

The open and obvious danger doctrine attacks the duty element that a plaintiff must establish in a prima facie negligence case. *Bertrand*, 449 Mich at 612. Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, a possessor of land must take reasonable precautions to protect an invitee from that risk. If such special aspects are lacking, the open and obvious condition is not unreasonably dangerous. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001).

The defense of open and obvious danger applies to a premises liability case if the plaintiff has pleaded the case as one of a failure to warn if a dangerous condition on the land or as a breach of duty from allowing a dangerous condition to exist on the land. *Laier v Kitchen*, 266 Mich App 482, 489; 702 NW2d 199 (2005). The nature of an action is determined by reading the claim as a whole and looking beyond the procedural labels to determine the exact nature of the claim. *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33; 697 NW2d 552 (2005).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

A claim alleging injury caused by a dangerous condition on the land sounds in premises liability, while a claim alleging injury caused by the defendant's conduct sounds in ordinary negligence. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

We conclude that the trial court correctly found that plaintiff's claim against Mirac/Enterprise sounded in premises liability rather than ordinary negligence. The harm in this case resulted from the existence of the trench and the allegations that the Enterprise employee failed to drop plaintiff off at a place that gave her a clear and unblocked path to the office, and also lead plaintiff through the trench and failed to tell plaintiff to not walk through the trench to get to the office. Thus, plaintiff's claim is premised on the allegation that the Enterprise employee failed to warn her of a dangerous condition on the land. Nothing in the claim alleged an action independent of the condition on the land and the failure to warn. There was no allegation of independent harm or action on the part of Mirac/Enterprise. For these reasons the claim against Mirac/Enterprise sounded in premises liability and not ordinary negligence. *James*, 464 Mich at 18-19; *Tipton*, 266 Mich App at 33.

Premises liability is conditioned on both possession of and control over the premises on which the injury occurred. *Kubczak v Chem Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). The evidence showed that Mirac/Enterprise did not have possession of or control over the premises on which plaintiff's injury occurred. Mirac leased the premises from DeMaagd. The construction project was being undertaken for the benefit of Sherwin-Williams, another tenant, and Mirac/Enterprise had no control over the project. The trial court correctly found that Mirac/Enterprise could not be liable under a premises liability theory because Mirac/Enterprise lacked possession of or control over the premises. *Id*.

Furthermore, the trial court correctly found that even if plaintiff's claim could be said to be sound in premises liability, Mirac/Enterprise could not be liable because the condition on the land was open and obvious and no special aspects made the condition unreasonably dangerous. Plaintiff acknowledged that she saw the trench as soon as she arrived on the premises. Moreover, plaintiff was not required to traverse the trench in order to gain access to Enterprise's office. Two alternate routes existed, either one of which would have allowed plaintiff to avoid the trench. The fact that plaintiff did not see either route at the time is irrelevant. The danger

caused by the trench was not effectively unavoidable. Therefore, no special aspects made the condition unreasonably dangerous. *Hoffner v Lanctoe*, 492 Mich 450, 463; 821 NW2d 88 (2012); *Lugo*, 464 Mich at 523-524.

Finally, even if plaintiff's claim against Mirac/Enterprise could be said to be sound in ordinary negligence, plaintiff would not be entitled to relief. Plaintiff admitted that she was never told to follow the Enterprise employee or to cross through the trench. Plaintiff chose to cross the trench on her own and mimic the actions of the employee. Plaintiff has not shown the required breach of duty on the part of Mirac/Enterprise.

Next, plaintiff argues that the trial court erred in granting summary disposition in favor of Hunter-Prell Company because the dirt-covered and crumbling blacktop surrounding the trench was not open and obvious and in any event was effectively unavoidable.

The open and obvious danger doctrine is commonly applied in premises liability cases as a limitation on the duty of care owed and often in the context of a duty to warn. *Bertrand*, 449 Mich at 610. [A] "duty exists because the relationship between the parties gives rise to a legal obligation." *Id*. at 614.

"Whether a danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection. This test focuses on the 'reasonably prudent person,' and is, therefore, objective in nature. Thus, courts are required to determine whether a *reasonable person* in the plaintiff's position would foresee the danger, and not whether a particular plaintiff should have foreseen the danger." *Laier*, 266 Mich App at 498 (Citations omitted; emphasis in original).

Plaintiff acknowledged that she saw the trench as soon as she arrived at the location. Plaintiff's assertion that the danger caused by the dirt-covered and crumbling blacktop was not open and obvious is without merit. The edge of the trench must be considered part of the trench as a whole. The trench as a whole was open and obvious.

For the reasons stated above, we find that the trench had no special aspects that made it unreasonably dangerous. Two alternate routes existed to the Enterprise building, and plaintiff could have taken either route and avoided the trench completely.

Affirmed. No costs are awarded. MCR 7.219.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello